Jumsar (Sarawak) Sdn Bhd v Robin Dockyard & Engineering Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-02(NCvC)(A)-1267–09 OF 2020 AND Q-02(C)(A)-1268–09 OF 2020

YAACOB MD SAM, SUPANG LIAN AND GUNALAN MUNIANDY JJCA

8 MARCH 2023

Building and Construction Law — Adjudication — Adjudication decision — Adjudicator ruled in favour of respondent and ordered appellant to pay sum claimed — Appellant's application to set aside adjudication decision dismissed and respondent's application to enforce adjudication decision allowed by High Court — Whether adjudicator relied on further or additional evidence which he sourced for on his own from public domain in arriving at adjudication decision without giving parties opportunity to comment on such further or additional evidence — Whether adjudicator decided issue of whether damage to floating pontoon existed at time of delivery or handing over upon factual basis which had not been argued or put forward by either side

The appellant ie Jumsar (Sarawak) Sdn Bhd ('Jumsar') was at all material times involved in the business of supplying industrial equipment parts and accessories as well as general contract works. Jumsar was the subcontractor for the Kuching Waterfront Darul Hana Musical Fountain Project ('the project'). The respondent ie Robin Dockyard & Engineering Sdn Bhd ('Robin Dockyard') was at all material times involved in the business of operating dockyards and ship repair. Robin Dockyard was one of the sub-contractors appointed by Jumsar to supply and install a floating pontoon for the project. Jumsar emailed its preliminary drawings of the floating pontoon for the project to Robin Dockyard and requested a quotation of the same from Robin Dockyard. Robin Dockyard emailed its quotation for the sum of RM1,191,545 ('the first quotation') together with its revised drawings of the floating pontoon for the project to Jumsar. Jumsar realised that Robin Dockyard did not include in its first quotation and revised drawings, the protection screen for the floating pontoon as per Jumsar's preliminary drawings. Hence, Jumsar had requested Robin Dockyard to revise its first quotation by including the protection screen as part of its scope of work and also requested Robin Dockyard to reduce the price of the floating pontoon in the first quotation. Robin Dockyard emailed its revised quotation ('the revised quotation') to Jumsar that included the protection screen for the floating pontoon as part of its scope of work and reduced the price to RM1,150,000. The revised quotation was duly confirmed and accepted by Jumsar. Robin

Dockyard delivered and installed the floating pontoon at the site in early October 2018 and issued various invoices to Jumsar claiming for the contract works and other variation works carried out in respect of the project. Jumsar made part payments towards the invoices issued by Robin Dockyard but withheld the remaining claims on the ground that: (a) the floating pontoon was incomplete. Robin Dockyard did not install the protection screen as required under the revised quotation; and (b) the floating pontoon was already damaged at the time of delivery. Robin Dockyard commenced an adjudication proceeding against Jumsar under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') claiming for the remaining outstanding sum allegedly due and owing from Jumsar. The adjudicator ruled in favour of Robin Dockyard and ordered Jumsar to pay Robin Dockyard the sum claimed. Robin Dockyard commenced an originating summons to enter the adjudication decision ('AD') as a judgment pursuant to s 28 of the CIPAA. Jumsar commenced an originating summons to set aside the AD based on the grounds that the adjudicator had acted in excess of his jurisdiction and that there was breach of natural justice by the adjudicator in coming to the AD. The learned judicial commissioner ('LJC') dismissed Jumsar's application to set aside the AD and allowed Robin Dockyard's application to enforce the AD. Hence, these appeals. Jumsar's broad grounds against the LJC's decision were: (i) the adjudicator relied on further or additional evidence which he sourced for on his own from the public domain in arriving at the AD without giving the parties an opportunity to comment on such further or additional evidence; and (ii) the adjudicator had decided the issue of whether the damage to the floating pontoon existed at the time of delivery or handing over upon a factual basis which had not been argued or put forward by either side.

Held, allowing the appeals:

(1) The LJC was plainly in error when he made a finding that there was no need for reference of the additional evidence to the parties based on the LJC's own speculation that the appellant could not have made any useful comment on it. The LJC fell into error in holding that the impugned act of the adjudicator was within the ambit of s 25 of the CIPAA for failing to appreciate the following factors: (a) the date of issuance of the Certificate of Practical Completion ('CPC') was clearly not within the meaning of the word 'knowledge' in s 25(d) as the information was derived from an external source; and (b) while s 25(i) gave leeway to the adjudicator to make enquiries as expressly spelt out, it could not be construed to mean that the adjudicator could source for such additional facts or evidence without affording the parties an opportunity to be heard on the same. The LJC had erred in principle in failing to judicially appreciate that the adjudicator's reference to the Malaysia Auditor General's Report and the information therein contained without

affording the parties the right to comment or be heard on the same amounts to a breach of natural justice (see paras 29 & 31–32).

(2) The LJC had erred in law and fact in failing to apply correctly established principles governing the concept of natural justice. The LJC had consequently wrongly concluded that the adjudicator had not breached the rule of natural justice in regard to the right to be heard when he took into consideration extraneous documents and/or evidence not referred to by either or both of the litigating parties on core issues in dispute. The impugned document or evidence was a material factor in the decision-making process by the adjudicator in the adjudication. The rule of natural justice required the adjudicator to disclose any information he obtained from sources other than the parties to the adjudication proceedings and to allow the parties to address him on such information. However, the issuance of CPC for the project on 18 October 2018 was never raised or mentioned by either party during the adjudication proceedings. Neither did any party address the adjudicator on the issuance of CPC for the project and/or its relevancy to the issue of whether the damage to the floating pontoon existed at the time of delivery or handing over. The adjudicator should have rightly adopted the simple step of disclosing the additional evidence procured by him from an external source to the parties concerned to dispel any notion or suggestion of injustice. The adjudicator relied on the CPC date in the report which he sourced for from the public domain to conclude that the damage to the floating pontoon did not exist at the time of handing over and the floating pontoon was in compliance to the drawing, specification and conditions as agreed upon to be fit for handing over. Hence, the contention that the CPC was not a material factor but only one of the several factors that led to the conclusion reached on the core issues by the adjudicator failed (see paras 40–42 & 45–46).

[Bahasa Malaysia summary

Perayu iaitu Jumsar (Sarawak) Sdn Bhd ('Jumsar') pada semua masa yang material terlibat dalam perniagaan membekalkan bahagian dan aksesori peralatan industri serta kerja-kerja kontrak umum. Jumsar adalah subkontraktor untuk Projek Air Pancut Berirama Waterfront Darul Hana Kuching ('projek'). Responden iaitu Robin Dockyard & Engineering Sdn Bhd ('Robin Dockyard') pada semua masa yang material terlibat dalam perniagaan mengendalikan limbungan dan pembaikian kapal. Robin Dockyard adalah salah satu subkontraktor yang dilantik oleh Jumsar untuk membekal dan memasang pontun terapung untuk projek tersebut. Jumsar menghantar emel lukisan awal pontun terapung untuk projek itu kepada Robin Dockyard dan meminta sebut harga daripada Robin Dockyard. Robin Dockyard menghantar sebut harga sebanyak RM1,191,545 ('sebut harga pertama') bersama dengan lukisan dipinda pontun terapung untuk projek itu kepada Jumsar. Jumsar

menyedari bahawa Robin Dockyard tidak memasukkan dalam sebut harga pertama dan lukisan dipinda mereka, skrin perlindungan seperti yang terdapat dalam lukisan awal Jumsar. Oleh itu, Jumsar meminta Robin Dockyard untuk meminda sebut harga pertamanya dengan memasukkan skrin perlindungan sebagai sebahagian daripada skop kerja mereka dan juga meminta Robin Dockyard untuk mengurangkan harga pontun terapung dalam sebut harga pertama. Robin Dockyard telah menghantar sebut harga yang dipinda ('sebut harga yang dipinda') kepada Jumsar yang memasukkan skrin perlindungan untuk pontun terapung sebagai sebahagian daripada skop kerja mereka dan mengurangkan harga kepada RM1,150,000. Sebut harga yang dipinda telah disahkan dan diterima oleh Jumsar. Robin Dockyard menghantar dan memasang pontun terapung di lokasi pada awal Oktober 2018 dan mengeluarkan pelbagai invois kepada Jumsar yang menuntut pembayaran untuk kerja kontrak dan kerja variasi lain yang dilakukan bagi projek tersebut. Jumsar telah membuat sebahagian pembayaran terhadap invois yang dikeluarkan oleh Robin Dockyard tetapi menahan tuntutan selebihnya dengan alasan bahawa: (a) pontun terapung itu tidak lengkap. Robin Dockyard tidak memasang skrin perlindungan seperti yang diperlukan di bawah sebut harga yang dipinda; dan (b) pontun terapung telah pun rosak pada waktu penghantaran. Robin Dockyard memulakan proses adjudikasi terhadap Jumsar di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('CIPAA') bagi menuntut baki jumlah yang didakwa masih terhutang daripada Jumsar. Adjudikator memutuskan berpihak kepada Robin Dockyard dan memerintahkan Jumsar membayar jumlah yang dituntut oleh Robin Dockyard. Robin Dockyard memulakan saman pemula untuk memasukkan keputusan adjudikasi ('AD') sebagai suatu penghakiman menurut s 28 CIPAA. Jumsar memulakan saman pemula untuk membatalkan AD atas alasan bahawa adjudikator telah bertindak melebihi bidang kuasanya dan bahawa terdapat pelanggaran keadilan semula jadi oleh adjudikator dalam membuat keputusan AD tersebut. Pesuruhjaya kehakiman yang bijaksana ('LJC') menolak permohonan Jumsar untuk membatalkan AD dan membenarkan permohonan Robin Dockyard untuk menguatkuasakan AD. Oleh itu, rayuan ini. Alasan-alasan umum Jumsar terhadap keputusan LJC adalah: (i) adjudikator bergantung kepada keterangan tambahan yang diperolehnya sendiri dari domain awam dalam mencapai keputusan AD tanpa memberikan peluang kepada pihak-pihak untuk memberi ulasan terhadap keterangan tambahan tersebut; dan (ii) adjudikator telah memutuskan isu sama ada kerosakan pada pontun terapung wujud pada waktu penghantaran berdasarkan fakta yang tidak dipertikaikan atau diajukan oleh mana-mana pihak.

Diputuskan, membenarkan rayuan-rayuan:

(1) LJC jelas terkhilaf apabila mendapati bahawa tidak ada keperluan untuk merujuk keterangan tambahan kepada pihak-pihak berdasarkan andaian LJC sendiri bahawa perayu tidak dapat memberikan sebarang komen

berguna mengenainya. LJC telah melakukan kesilapan dengan menyatakan bahawa tindakan adjudikator yang dipersoalkan berada dalam lingkungan s 25 CIPAA kerana gagal menghargai faktor-faktor berikut: (a) tarikh penerbitan Perakuan Siap Kerja ('CPC') jelas bukan dalam erti kata 'pengetahuan' dalam s 25(d) kerana maklumat tersebut diperoleh dari sumber luar; dan (b) walaupun s 25(i) memberikan ruang kepada adjudikator untuk membuat pertanyaan seperti yang dinyatakan, ia tidak boleh ditafsirkan untuk bermaksud bahawa adjudikator boleh mencari fakta atau keterangan tambahan tanpa memberikan peluang kepada pihak-pihak untuk didengar mengenainya. LJC telah melakukan kesilapan dalam prinsip dengan gagal menghargai secara kehakiman bahawa rujukan adjudikator kepada Laporan Ketua Audit Negara Malaysia dan maklumat yang terkandung di dalamnya tanpa memberikan kesempatan kepada pihak-pihak untuk memberikan komen atau didengar mengenainya adalah satu pelanggaran keadilan semula jadi (lihat perenggan 29 & 31–32).

(2) LJC telah melakukan kesilapan dari segi undang-undang dan fakta dalam gagal menerapkan prinsip yang telah ditetapkan berkenaan konsep keadilan semula jadi. Oleh itu, LJC dengan salah menyimpulkan bahawa adjudikator tidak melanggar peraturan keadilan semula jadi mengenai hak untuk didengar apabila beliau mempertimbangkan dokumen dan/atau keterangan asing yang tidak dirujuk oleh mana-mana pihak atau kedua-duanya pada isu-isu utama yang dipertikaikan. Dokumen atau keterangan yang dipersoalkan adalah faktor material dalam proses pembuatan keputusan oleh adjudikator dalam adjudikasi. Peraturan keadilan semula jadi memerlukan adjudikator untuk mendedahkan sebarang maklumat yang diperolehnya dari sumber selain dari pihak-pihak dalam prosiding adjudikasi dan untuk membenarkan pihak-pihak untuk menangani maklumat tersebut. Namun, pengeluaran CPC untuk projek pada 18 Oktober 2018 tidak pernah dibangkitkan atau disebut oleh mana-mana pihak semasa prosiding adjudikasi. Tiada pihak yang memberikan kenyataan kepada adjudikator mengenai pengeluaran CPC untuk projek dan/atau kaitannya kepada isu sama ada kerosakan kepada pontun terapung wujud pada masa penyerahan atau pemindahan. Adjudikator seharusnya mengambil langkah mudah untuk mendedahkan keterangan tambahan yang diperoleh dari sumber luar kepada pihak-pihak yang terlibat untuk menghilangkan sebarang tanggapan atau cadangan ketidakadilan. Adjudikator bergantung kepada tarikh CPC dalam laporan yang diambil dari domain awam untuk menyimpulkan bahawa kerosakan kepada pontun terapung tidak wujud pada masa penyerahan dan pontun terapung mematuhi lukisan, spesifikasi dan syarat yang dipersetujui untuk diserahkan. Oleh itu, pertikaian bahawa CPC bukan faktor material tetapi hanya salah satu daripada beberapa faktor yang membawa kepada kesimpulan yang

dicapai pada isu-isu utama oleh adjudikator adalah gagal (lihat perenggan 40–42 & 45–46).]

Cases referred to

Cantillion Ltd v Urvasco Ltd [2008] All ER (D) 406 (Feb), QBD (refd)
Modscape Pty Ltd v Sive [2017] TASSC 7, SC (refd)
Wrp Asia Pacific Sdn Bhd v Ns Bluescope Lysaght Malaysia Sdn Bhd [2015] MLJU 1125; [2015] 1 LNS 1236, HC (refd)
Xtreme Engineering Sdn Bhd v Paragon Promenade Sdn Bhd [2019] 1 LNS 113, HC (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 15 25, 25(d), (i), 28

Appeal from: *Jumsar (Sarawak) Sdn Bhd v Robin Dockyard & Engineering Sdn Bhd and another case* [2021] 10 MLJ 424 (High Court, Kuching)

Liew Sheau Kie (Loke, King, Goh & Partners Advocates) for the appellant.
Alvin Yong Sze Lung (with Wong Chun Ming) (Alvin Yong Advocates) for the respondent.

Gunalan Muniandy JCA:

INTRODUCTION

[1] There are two appeals before us arising from decision made by the learned judicial commissioner ('LJC') of the High Court ('HC') in Kuching, Sarawak. The first decision appealed against was to allow the respondent's application to enforce the adjudication decision ('AD') dated 3 January 2020 while the second appeal was against the LJC's decision to dismiss the appellant's application to set aside the said AD. For convenience, we would refer to the appellant as 'Jumsar' and the respondent as 'Robin Dockyard'.

BRIEF FACTS OF THE CASE

[2] Jumsar was at all material times involved in the business of supplying industrial equipment, parts and accessories as well as general contract works. Jumsar was the subcontractor for the Kuching Waterfront Darul Hana Musical Fountain Project ('the project').

[3] Robin Dockyard was at all material times involved in the business of operating dockyards and ship repair. Robin Dockyard was one of the sub-contractors appointed by Jumsar to supply and install a 15m x 110m x

1.325m pipe-frame type floating pontoon ('the floating pontoon') for the project.

[4] On 18 April 2018, Jumsar emailed its preliminary drawings of the floating pontoon for the project to Robin Dockyard and requested a quotation of the same from Robin Dockyard.

[5] On 16 May 2018, Robin Dockyard emailed its quotation dated 17 May 2018 for the sum of RM1,191,545 ('the first quotation') together with its revised drawings of the floating pontoon for the project to Jumsar.

[6] Upon receipt of the first quotation and revised drawings, Jumsar realised that Robin Dockyard did not include in its first quotation and revised drawings, the protection screen for the floating pontoon as per Jumsar's preliminary drawings. Hence, Jumsar had requested Robin Dockyard to revise its first quotation by including the protection screen as part of its scope of work. Jumsar has also requested Robin Dockyard to reduce the price of the floating pontoon in the first quotation.

[7] On 22 May 2018, Robin Dockyard emailed its revised quotation dated 4 June 2018 ('the revised quotation') to Jumsar. Robin Dockyard had included therein the protection screen for the floating pontoon as part of its scope of work and reduced the price to RM1.15m. The revised quotation was duly confirmed and accepted by Jumsar on 5 June 2018.

[8] Robin Dockyard delivered and installed the floating pontoon at the site in early October 2018. Robin Dockyard issued various invoices to Jumsar claiming for the contract works and other variation works carried out in respect of the project.

[9] Jumsar made part payments towards the invoices issued by Robin Dockyard but withheld the remaining claims on the ground that:

(a) the floating pontoon was incomplete. Robin Dockyard did not install the protection screen as required under the revised quotation; and

(b) the floating pontoon was already damaged at the time of delivery.

[10] Robin Dockyard commenced an adjudication proceeding against Jumsar under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') claiming for the remaining outstanding sum allegedly due and owing from Jumsar.

[11] On 3 January 2020, the Adjudicator ruled in favour of Robin Dockyard

and ordered Jumsar to pay Robin Dockyard the sum claimed by Robin Dockyard.

[12] On 22 January 2020, Robin Dockyard commenced Originating Summons No KCH-24NCvC-2/1 of 2020 to enter the adjudication decision as a judgment pursuant to s 28 of the CIPAA.

[13] On 7 February 2020, Jumsar commenced Originating Summons No KCH-24C (ARB)-1/2 of 2020 to set aside the adjudication decision based on the grounds that the adjudicator had acted in excess of his jurisdiction and that there was breach of natural justice by the adjudicator in coming to the adjudication decision.

[14] On 12 August 2020, the High Court dismissed Jumsar's application to set aside the adjudication decision and allowed Robin Dockyard's application to enforce adjudication decision ('AD').

OUR DECISION

[15] In a nutshell, the decision of the adjudicator which the appellant sought to set aside in the setting aside OS ('OS.1') was, as per the appellant's submission as follows:

(a) the respondent has succeeded in their total claim of RM657,745 which is recorded as the adjudicated sum;

(b) the rate of interest payment is 5%pa from 8 October 2018 to settlement of unpaid amount; and

(c) the appellant shall bear 100% of the costs of adjudication in the total sum of RM53,869.80.

[16] The thrust of the appellant's case in the HC was that the adjudicator in arriving at his AD had breached the established rules of natural justice, particularly in denying the appellant the right to be heard on issues material to the decision-making process.

[17] For convenience, we would set out the appellant's broad grounds against the LJC's decision as follows:

(a) the adjudicator relied on further or additional evidence which he sourced for on his own from the public domain in arriving at the adjudication decision without giving the parties an opportunity to comment on such further or additional evidence; and

(b) the adjudicator had decided the issue of whether the damage to the

floating pontoon existed at the time of delivery or handing over upon a factual basis which has not been argued or put forward by either side. A

[18] In dealing with the appellant's contention that the adjudicator had gone on a frolic of his own by relying on the Malaysian Audit Report ('MAR') in finding that the CPC had been issued for the project, the LJC noted that there were two issues in contention between the parties in the adjudication proceedings: B

(a) the primary issue was whether under the contract between the parties, Robin Dockyard was to supply and install a protection screen for the floating pontoon or was merely to install a protection screen (with the provision of the protection screen the responsibility of Jumsar or others); and C

(b) the secondary issue was whether at the time of delivery of the floating pontoon by Robin Dockyard to Jumsar, the floating pontoon had any defects. D

[19] In essence the LJC held that it was erroneous for counsel for the appellant to argue to the effect that the adjudicator had based his whole decision on the CPC, when the CPC was merely one of the factors the adjudicator had taken into account in his ruling on the secondary issue. His finding as regards the purported reliance of the adjudicator on the CPC was that the adjudicator did not rely on the CPC in his reasoning and ruling in favour of Robin Dockyard on the primary issue whether Robin Dockyard was to supply the protection screen, on top pf installing the screen. E F

[20] Secondly, on the issue of natural justice, the LJC rejected the contention that the fact the adjudicator did not ask the parties to comment on the CPC, amounted to a breach of natural justice. G

[21] In the LJC's view, the role of an adjudicator differed in many respects from a judge or judicial officer in a judicial proceeding, amongst others, that under the adjudication process an adjudicator not only has the role of adjudicating the merits of the material and arguments presented by the parties, he also has the powers to 'draw on his own knowledge and expertise' and to 'inquisitorially take the initiative to ascertain the facts and the law required for the decision' (see s 25 of the CIPAA Act). In the instant adjudication proceedings, the adjudicator had done exactly that on the secondary issue whether that floating pontoon had defects at the time of delivery. He had, further, drawn upon his knowledge and expertise to surmise that a CPC would have been issued only if the project had been deemed completed and had taken the initiative to verify that a CPC was indeed issued, from the Auditor General's report. H I

[22] Further, that the gravamen of the appellant's complaint of not having been given an opportunity to comment on the CPC could be resolved by answering the question as to what the appellant could have commented or submitted on the CPC. In others words, that being denied the right or opportunity to address the adjudicator did not amount to a denial of the appellant's right to be heard in the decision-making process.

[23] Essentially, the LJC concluded on the issued at hand that the above denial of the opportunity to be heard on the CPC could not be considered a breach of any rule of natural justice as the CPC by itself was not conclusive evidence and the adjudicator took cognisance of the same as reflected in para 100 of his AD.

[24] In support of the LJC's view that the CPC is not conclusive evidence that there were no defects in that there could be defects that were not patent, ie, latent, the LJC made reference to *Xtreme Engineering Sdn Bhd v Paragon Promenade Sdn Bhd* [2019] 1 LNS 113, which held that practical completion of a project denotes 'a state of affairs in which the works have been completed free from patent defects other than ones to be ignored as trifling'.

[25] In conclusion on the issue at hand, the LJC held that the breach, if any by adjudicator was not material and, thus, could not be considered a breach of natural justice in accordance with trite principle.

[26] In contrast to what the respondent has submitted, we have to give due regard to the thrust of the appellant's contention that the adjudicator had relied on additional evidence, ie CPC, sourced from the public domain on a determinative issue. The issue was as to the date the project was certified to have been completed. It was evidenced by para 98 of the AD wherein the adjudicator stated that:

> Although both Claimant and Respondent did not provide me with any details of progress certificate from the consultant or client on the project, I was able to obtain Malaysia Audit General's report via public domain. Under Laporan Ketua Audit Negara — Pengurusan Aktiviti Dan Pengurusan Syarikat Kerajaan Negeri — Sarawak — Tahun 2018 Siri 2 page 43 (chapter 2–5), it provides that the project had obtained its Certificate of Practical Completion (CPC) on 18.10.2018.

[27] A case squarely in point that the appellant brought to our attention is *Cantillion Ltd v Urvasco Ltd* [2008] All ER (D) 406 (Feb), where Akenhead J summarised the guidelines relating to breaches of natural justice in adjudication cases in para 57 as follows:

(a) it must first be established that the adjudicator had failed to apply the rules of natural justice;

(b) any breach of the rules must be more than peripheral; they must be material breaches;

(c) breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant;

(d) whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree; and

(e) it is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, or, where the adjudicator puts in further evidence without giving the parties an opportunity to comment on that the breach of the rules of natural justice comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto.

[28] We accept as good law the principle expounded by the English court above on this area of the law, specifically, that the act of the adjudicator in introducing or putting in additional or further evidence without giving the parties an opportunity to comment on such additional or further evidence would amount to a breach of natural justice.

[29] While we have taken cognisance of the LJC's finding that the additional evidence that the adjudicator had taken into consideration in arriving at his decision was, even though it was a document extracted from the public domain that neither party had referred to in the proceedings, it was not a material fact that figured importantly in the adjudicator's conclusion, our view differs with that of the LJC. In our considered view, the LJC was plainly in error when he made a finding that there was no need for reference of the additional evidence to the parties based on the LJC's own speculation that the appellant could not have made any useful comment on it.

[30] In the LJC's view, the act of the adjudicator complained of was not contrary to law by reference to s 25 of CIPAA which provides that:

> The adjudicator shall have the powers to —
>
> (d) draw on his own knowledge and expertise;
>
> (i) inquisitorially take the initiative to ascertain the facts and the law required for the decision.

[31] With respect, we are in agreement with the contention of the appellant that LJC fell into error in holding that the impugned act of the adjudicator was within the ambit of the above provisions of s 25 of the CIPAA for failing to appreciate the following factors:

(a) the date of issuance of the CPC was clearly not within the meaning of the word 'knowledge' in s 25(d) as the information was derived from an external source; and

(b) while s 25(i) gives leeway to the adjudicator to make enquiries as expressly spelt out, it cannot be construed to mean that the adjudicator can source for such additional facts or evidence without affording the parties an opportunity to be heard on the same.

[32] In the circumstances as alluded to above, we would conclude on the issue at hand that the LJC had erred in principle in failing to judicially appreciate that the adjudicator's reference to the Malaysia Auditor General's report and the information therein contained without affording the parties the right to comment or be heard on the same amounts to a breach of natural justice.

[33] Having concluded as aforesaid, we would proceed to comment on the appellant's contention that the adjudicator had decided the dispute as to the defect/damage to the pontoon at the time of handing over upon a factual basis that neither party had put forward before the proceedings. In this regard, the relevant part of the AD was highlighted to us as follows:

> If the defects on the pontoon existed before 18.10.2018, the CPC cannot be issued out. Therefore, I determined that during the point of handing over the pontoon is deemed to be in compliance to the drawing, specification, and condition to be fit for handing over.

[34] As pointed out to us, it was plainly apparent that the finding that the floating pontoon was not damaged and was in compliance to specification and drawing at the time of delivery or handing over was made purely based on the issuance of CPC on 18 October 2018 as stated in the said report.

[35] With respect to this second ground of appeal, the respondent's position in gist was that a serious mistake in finding of fact per se is not among the grounds upon which the AD can be set aside under s 15 of the CIPAA, which is clear from the wording of this statutory provision. Also that in the affidavit in support ('AIS') the plaintiff cloaks this ground as breach of natural justice in an obvious attempt to bring this complaint within the ambit of the CIPAA.

[36] The alleged failure by the adjudicator to consider relevant evidence was purportedly a breach of natural justice. In particular, the important evidence

that the adjudicator was said to have disregarded was the preliminary drawings and the contract which were before the adjudicator for consideration as brought to our attention by the appellant.

[37] The respondent, on the other hand, urged us to consider that it was undisputed that the evidence pertaining to the protection screen was before the adjudicator where the parties had also presented their case pertaining to this subject to the adjudicator.

[38] Essentially, the appellant's complaint against the AD pertained to para 91 which states that:

> Having examined the contract drawing, I find no place in the drawing indicating the 15m protection screen, or any indicator or where to install/receive such screen on any part of the pontoon.

[39] The respondent's contrary contention on this point was that the above complaint had taken the AD out of context in that para 91 was only a part of the AD's 'Findings and Reasons'. In his determination at para 92, the adjudicator had decided that the absence of the protection screen on the completed pontoon did not constitute any omission of work from the contract having considered the revised quotation dated 4 June 2018. As such, it was submitted that the AD had merely decided to accept the respondent's version of the case.

[40] While we acknowledge that the arguments put forth by the respondent in favour of the LJC's reasoning and decision arrived at, we are inclined to uphold the position advanced by the appellant that the LJC had erred in law and fact in failing to apply correctly established principles governing the concept of natural justice. In our considered view, the LJC had consequently wrongly concluded that the adjudicator had not breached the rule of natural justice in regard to the right to be heard when he took into consideration extraneous documents and/or evidence not referred to by either or both of the litigating parties on core issues in dispute. We are not in agreement with the respondent's contention that the impugned document or evidence was not a material factor in the decision-making process by the adjudicator in the present adjudication. .

[41] In support of the decision reached by us, we deem it fit to reiterate certain crucial factors. Amongst others, that the rule of natural justice requires the adjudicator to disclose any information he obtained from sources other than the parties to the adjudication proceedings and to allow the parties to address him on such information. However, in this instance, the issuance of CPC for the project on 18 October 2018 was never raised or mentioned by

either party during the adjudication proceedings. Neither did any party address the adjudicator on the issuance of CPC for the project and/or its relevancy to the issue of whether the damage to the floating pontoon existed at the time of delivery or handing over.

[42] The adjudicator, in our view, should have rightly adopted the simple step of disclosing the additional evidence procured by him from an external source to the parties concerned to dispel any notion or suggestion of injustice. See *Wrp Asia Pacific Sdn Bhd v Ns Bluescope Lysaght Malaysia Sdn Bhd* [2015] MLJU 1125; [2015] 1 LNS 1236.

[43] When an adjudicator makes a determination on a factual basis that was different from that relied upon by the parties in concluding their case, it was incumbent for the adjudicator to have afforded the parties an opportunity to be heard on the fresh factual basis not advanced by them. By not taking this crucial step, he would fall foul of the cardinal rule of natural justice (*Modscape Pty Ltd v Sive* [2017] TASSC 7)

[44] Next, it was clear from adjudicator's statements in the relevant paragraphs of the AD that the adjudicator was unable to decide on the issue of whether the damage to the floating pontoon existed at the time of delivery or handing over based on the documentary evidence adduced by the parties during the adjudication proceedings.

[45] Importantly, the adjudicator relied on the CPC date in the said report which he sourced for from the public domain to conclude that the damage to the floating pontoon did not exist at the time of handing over and the floating pontoon is in compliance to the drawing, specification and conditions as agreed upon to be fit for handing over.

[46] Hence, the contention that the CPC was not a material factor but only one of the several factors that led to the conclusion reached on the core issues by the adjudicator fails. On the contrary, it clearly was of considerable importance and had a decisive effect as pointed out by the appellant.

CONCLUSION

[47] While we do not take any issue with the respondent's proposition that even if the adjudicator had erred in his finding, it is well established that a wrong finding by the adjudicator under the CIPAA only amounts to a breach of natural justice in very limited circumstances, the respondent's submission that the said limited circumstances were not existent in the instant case was wholly misconceived.

[48] At the conclusion of this appeal, we arrived at the following decision by majority (Yaacob Haji Md Sam JCA in dissenting was of the view that the finding by the judge was made after careful analysis of the evidence and was not plainly wrong to justify appellate intervention). This judgment is therefore to be regarded as a majority judgment that determines this appeal.

[49] In our considered view, the AD was tainted in principle by reason of clear breach of natural justice by the adjudicator for not affording a right to be heard to the appellant when the adjudicator made reference to the contents of the Audit General report (AG report) in relation to the issuance of the certificate of practical completion (CPC) in allowing the claim of the respondent that came before the adjudicator.

[50] The issue of CPC or the AG report was never raised by the any party nor were they were given an opportunity to address the adjudicator before he arrived at his decision at the conclusion of the adjudication proceedings.

[51] Our view is that the aforesaid breach of due process by the adjudicator was fundamental to warrant interference by us. Hence, the LJC had plainly erred in law and fact in his decision to dismiss the appellant's application to set aside the AD and to allow the respondent's application to enforce the AD.

[52] We, therefore, allow both appeals with costs of RM15,000 here and below subject to allocator in respect of the first appeal and RM5,000 here and below subject to allocator in respect of the second appeal. The orders made by the LJC are hereby accordingly set aside.

Appeals allowed.

Reported by Nabilah Syahida Abdullah Salleh